

# PROBLEMS OF TRIAL PRACTICE IN LOYALTY AND SECURITY CASES

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## INTRODUCTION

There are many problems of security facing the Government of the United States. How to meet them where the meeting touches individuals and still preserve security for personal rights is certainly among the most perplexing of the issues in the whole loyalty-security program.<sup>1</sup> Such issues as they affect the rights of persons, are not the problem of government alone. The whole civilized community has a stake in salvaging individual liberty.

A more narrow but immediate and practical involvement of concern to the community at large is the subject of this article. For here the focus is the trial—the system for defending persons who find themselves under investigation on loyalty-security charges. The burden of defense<sup>2</sup> falls upon private counsel. Despite the government's insistence upon the investigatory nature of loyalty-security procedures, its position approximates that of prosecutor and however much "Let Justice be done" may ideally represent the role of government, the respondent's surest hope here, as elsewhere and always, lies in the thorough preparation and vigorous presentation of his defense.

The optimistic aim of all that follows is to cover the most important general problems involved in the trial of individuals charged as loyalty-security risks under whatever part<sup>3</sup> of the whole program

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<sup>1</sup> The program has had two main phases. The first emphasized the problem of loyalty to the United States, see Exec. Order No. 9835, 12 FED. REG. 1935 (1947), as amended by Exec. Order No. 10241, 16 FED. REG. 3690 (1951). The second broadened the program, included loyalty as part of its concern but went further to include other aspects of security such as reliability, truthfulness, reprehensible conduct, poor judgment and instability, disqualifying illness, pressure risks, assertion of the privilege against self-incrimination before a Congressional committee, Exec. Order No. 10450, 18 FED. REG. 2489 (1953), willful violations of security regulations and foreign relatives, DEPARTMENT OF DEFENSE, *Industrial Personnel Security Review Regulation*, §III, par. (13) (14) and (21), (Directive issued February 2, 1955, No. 5220.6): B.N.A., GOVERNMENT SECURITY AND LOYALTY, 25: 156-158.

<sup>2</sup> The terminology is that of the criminal law. The Government, however, usually insists that the proceedings are an investigation only (*cf.*, Exec. Order No. 10450, §6 and 8, *op. cit. supra*, note 1) and any resemblance to criminal proceedings is illusory. This sophistry provides the rationale for the absence of a large variety of procedural and constitutional safeguards. See *Bailey v. Richardson*, 182 F. 2d 46 (1950), affirmed by an equally divided Supreme Court, 341 U.S. 918 (1951).

<sup>3</sup> This is only to note that there are parts other than the Federal Civilian Loyalty Security program, *e.g.* the Industrial Security Program, Atomic Energy Program, and Port Security Program.

the charges arise. Perhaps it is unnecessary to say that this does not imply that trial tactics to be evaluated here apply to every situation or can be applied mechanically in any case.

Mood is a factor in trial practice. And mood is a thing of the mind. A bit of browsing in "Alice in Wonderland" is best calculated to prepare the mind of the lawyer schooled in the Anglo-American tradition for the processes of the loyalty-security hearing. Though a respondent on trial has at stake his current job, his future prospects and his reputation, nearly all the familiar bench marks of procedure are gone except in name or are so turned about that they vouchsafe nothing. The lack of compulsory process, with its important function of protecting the witnesses while securing the evidence, the absence of any *right* to a bill of particulars, the lack of confrontation, cross examination and even knowledge of the identity of witnesses who have condemned the respondent—all combine to create a vastly unfamiliar system of procedure.

Furthermore, the standards for refusal of employment or removal have varied from time to time and requisite degrees of "proof" have never followed traditional "preponderance", "clear and convincing" or "beyond a reasonable doubt" tests. Executive Order 9835 established as a standard "reasonable grounds for belief that the person involved is disloyal".<sup>4</sup> Subsequently, that order was amended. Vindication thereafter depended on proof of loyalty "beyond a reasonable doubt",<sup>5</sup> the reverse of the criminal standard. This placed an unusual burden on the respondent who for all practical purposes had and has the burden of proof, as well as the burden of going forward.<sup>6</sup> A third standard was set down in Executive Order 10450.<sup>7</sup> Since the effective date of that order,<sup>8</sup> clearance has turned upon a showing "that the employment and retention in employment . . . is clearly consistent with the interests of the national security". Each of these criteria introduced new, strange obligations, and additional uncertainties.

Moreover, a useful experience for the evaluation of this degree of proof is not readily available. This is so because of the infrequency

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<sup>4</sup> Part V, *op. cit. supra*, note 1.

<sup>5</sup> Exec. Order No. 10241, *op. cit. supra*, note 1.

<sup>6</sup> There may be exceptions, but in case after case the Government has offered no evidence and merely reads the charges. From that point, the respondent is supposed to carry the burden. Query, to what degree this, in effect, equates charges with proof. For a revealing summation of the place and role of the limited number of witnesses for the Government that may be "invited" and those that may appear in "private" see DEPARTMENT OF THE ARMY, *Civilian Personnel Security Regulations*, Section VII, 37, (S.R.-620-220-1 of December 18, 1953 as amended September 30, 1954), B.N.A., *op. cit. supra*, note 1, 15:155.

<sup>7</sup> Exec. Order No. 10450 §2; see also §3(a), 5-8(a), *op. cit. supra*, note 1.

<sup>8</sup> 30 days after April 27, 1953. See Exec. Order No. 10450, §15, *id.*

with which the government introduces proof in hearings and the lack of anything resembling complete, official reporting of administrative decisions at either the hearing or appellate levels.<sup>9</sup>

In a large number of instances the substantive charges themselves contribute to an air of fantasy.<sup>10</sup> For example, a respondent was called upon to explain why his ex-wife, who lived some hundreds of miles away from him, had attended Communist meetings after their separation and divorce and, as it turned out, during a period while she was mentally ill.<sup>11</sup> In another case, a respondent was denied a hearing because it would not "do any good". The reason it would not "do any good" was because everything was known about him and he was "apparently entirely clear". However, his continued employment by the Government was not "clearly consistent with the interests of the national security". He had maintained an association with his father and his mother. In yet another, (these are not examples which taxed research facilities because all happen to come from cases with which one lawyer was directly involved as counsel) a respondent was called upon to answer why he had given A as a reference. A being an internationally known scientist of the highest repute and from time to time in charge of important research projects apparently of the type requiring the highest clearance, it was difficult to understand why the respondent needed to explain why he gave A's name as one who might vouch for him. The basis for the charge was that A's father had a cousin whose political chastity was in question, and that A's brother's wife's father, a prominent lawyer, once chaired a meeting of the Council on Soviet American friendship.

Significantly, the respondent was unacquainted with either of the persons who stigmatized him through his reference. Significantly, also, these "relatives" did not tarnish the reference because he was cleared

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<sup>9</sup> On the relatively infrequent occasions that loyalty-security matters get into court, reported decisions may be available. The Bureau of National Affairs, a private service, publishes *Government Security and Loyalty*, a manual which includes among other matters both court decisions and some decisional material from security hearing boards.

<sup>10</sup> The examples which follow do not represent the total array of charges against the individuals whose cases are the source of the illustrative material. However, this does not mean the examples are out of context and therefore distorted. Each represents an accurate summation of the charge which is used for illustration. In each instance, here and elsewhere in this paper where illustrations are used, the illustrations are real and are used anonymously with the permission of the respondents or are already public property to a degree making permission unnecessary.

<sup>11</sup> Her physician provided a letter absolving her of responsibility for any actions during an interval, closely coinciding with the time she allegedly attended the offending meetings and the undisputed evidence was that during this same period she did spend some time in a mental institution.

for access to secret information, and headed a highly secret project for a very sensitive agency.<sup>12</sup>

So it is that adequate preparation includes a re-shaping of conceptions both of trial procedure and the content of charges.

#### STATUTES, EXECUTIVE ORDERS AND REGULATIONS

A large number of federal statutes have touched the problem of the internal security of the United States in some of its phases.<sup>13</sup> However, the statute which is the legislative keystone of the loyalty-security program is Public Law 733.<sup>14</sup> That statute authorizes the top administrative head of named agencies and departments "in his absolute discretion and when deemed necessary in the interest of national security, [to] suspend, without pay, any civilian officer or employee".<sup>15</sup> Additional provisions allow notification of the reasons for suspension to the extent that the agency head determines that interests of national security permit, and the suspended employee has thirty days to submit statements or affidavits in support of his reinstatement or restoration to duty.<sup>16</sup> Following whatever review and investigation he deems necessary, the agency head may terminate the employment of the suspended employee "whenever he shall determine such termination necessary or advisable in the interest of the national security". His decision is final and conclusive.<sup>17</sup> Employees who have permanent or indefinite appointments, have completed trial or probationary periods and are United States citizens "shall be given after . . . suspension and before . . . employment is terminated" certain procedural rights.<sup>18</sup> The Act also provides that a suspended or terminated person may be reinstated or restored to duty at the discretion of the agency head but if reinstated or restored "shall be allowed compensation for all or any part of the

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<sup>12</sup> In a letter written to the respondent and in evidence at the respondent's hearing, scientist A reported that he had been cleared for "access to secret" and, he believed, "top secret information". He also indicated his directorship of the project referred to in the text above. For obvious reasons, the letter did not and could not indicate the nature of the project.

<sup>13</sup> See *Compilation of United States Laws Relating to National Security, Internal Security Manual*, 83d Cong., 1st Session, Senate Document No. 47. Exec. Order No. 9835, *op. cit. supra* note 1, was established under general statutory authority before the passage of Public Law 733.

<sup>14</sup> 64 STAT. 476, 5 U.S.C. §22-1 (1950).

<sup>15</sup> *Id.* §1.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> These include (1) a written statement of charges as specific as security considerations permit, (2) an opportunity to answer and submit affidavits, (3) a hearing, if requested, by the employee, before a "duly constituted agency authority for this purpose", (4) review by the agency head or his designee before an adverse decision is made final and (5) a written statement of the decision, *ibid.*

period of such suspension or termination"<sup>19</sup> but in any event not to exceed the difference between the pay lost during the time off and interim earnings.<sup>20</sup>

Termination under the Act does not affect the right to other federal employment but the appointment of a terminated person by another agency may be made only after consultation with the Civil Service Commission. The latter agency makes an eligibility determination at the written request of either the employing agency or the affected employee.<sup>21</sup>

Section 2 of Public Law 733 saves the review requirements of section 12 of the Atomic Energy Act of 1946. The remaining substantive section empowers the president to extend the provisions of the Act to other departments and agencies, as he deems necessary in the "best interests of national security".<sup>22</sup>

Presently, Executive Order 10450<sup>23</sup> is the primary directive from the Chief Executive implementing the loyalty-security program. The order, reflecting and expanding Public Law 733, places the responsibility for an effective program in the agency heads,<sup>24</sup> provides for the investigation of appointees to government jobs,<sup>25</sup> directs the agency head to designate sensitive positions,<sup>26</sup> requires full field investigations of the employees in or to be appointed to sensitive positions,<sup>27</sup> directs a review by the agency head or his designee of the cases of employees subjected to full field investigations under Executive Order 9835 and after appropriate further investigation to re-adjudicate such cases as have not been decided under a standard "commensurate with that established under this order".<sup>28</sup> Whenever information is received or developed by any agency or department indicating that the retention or employ-

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<sup>19</sup> *Ibid.* This quaint bit of draftmanship raises the interesting question whether the compensation is compulsory after restoration. Does "shall be allowed . . . all or any part" posit a duty to pay compensation?

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.* §3. Exec. Order No. 10237, 16 FED. REG. 3627 (1951) extended the Act to the Panama Canal and Panama Railroad Co. Exec. Order No. 10450 §1 *op. cit. supra*, note 1, opened the Act to cover "all other departments and agencies of the government". But see *Cole v. Young*, 351 U.S. 536 (1956) where the Supreme Court limited the extension of the summary procedures of the Act, holding that not all positions in the Government are effected with the national security as that term is used in the statute. Since a condition precedent had not been satisfied—the determination that the employee's position was one in which he could adversely affect the national security—his discharge was contrary to Public Law 733 and without authority.

<sup>23</sup> *Op. cit. supra*, note 1.

<sup>24</sup> Exec. Order No. 10450, *id.* §2.

<sup>25</sup> *Id.* §3(a).

<sup>26</sup> *Id.* §3(b).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* §4.

ment of any officer or employee is not clearly consistent with the national security, the information is forwarded to the head of the employing department or agency who, after further investigation, reviews, and if necessary, re-adjudicates.<sup>29</sup> The agency or department head is authorized to suspend immediately at any stage of investigation if he deems the national security demands it.<sup>30</sup> After investigation and review, the department or agency head terminates when he deems it necessary or advisable in the interests of the national security.<sup>31</sup>

To comport with the requirements of Public Law 733, the order provides that reinstatement or re-employment in the same or any other agency or department is discretionary with the agency or department head but where the same agency or department is *not* the re-employing unit the Civil Service Commission must make a determination of eligibility.<sup>32</sup>

Investigations under the order are aimed at developing specified types of security information but are not limited by the specifications.<sup>33</sup> The responsibilities for the investigations are divided under specified conditions between the Civil Service Commission, the employing agency and the Federal Bureau of Investigation.<sup>34</sup>

The Civil Service Commission is to establish and maintain a central index covering all persons investigated under Executive Order No. 10450 and the index previously established under Executive Order No. 9835 is to be incorporated in it.<sup>35</sup>

Additional matters, mainly housekeeping details, include a mandate for continuing study by the Civil Service Commission of the manner in which the program is implemented by departments and agencies. The study is to detect deficiencies in the security program or tendencies to deny individuals fair, impartial equitable treatment or rights under the Constitution and laws of the United States and Executive Order 10450 itself.<sup>36</sup>

The order makes no provision for appeal and contains no mention of hearings although the latter are provided for in sample regulations issued by the Department of Justice and hearing boards are presumed, in terms, by the official Presidential announcement of the order to the heads of all departments and agencies.<sup>37</sup>

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<sup>29</sup> *Id.* §5.

<sup>30</sup> *Id.* §6.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Id.* §7.

<sup>33</sup> *Id.* §8(a).

<sup>34</sup> *Id.* §8(b)(c) and (d).

<sup>35</sup> *Id.* §9(a).

<sup>36</sup> *Id.* §14.

<sup>37</sup> B.N.A., *op. cit. supra*, note 1, 15:64. Under Exec. Order No. 9835, *op. cit. supra*, note 1, dismissed employees were entitled to a review by the Civil Service Commission's Loyalty Review Board see *id.* Part III. See also *Kutcher v. Gray*, 199 F. 2d 783 (1952).

A large degree of uniformity has been achieved in the regulations issued by the departments and agencies to effect Executive Order 10450. Doubtless this reflects the influence of the Department of Justice sample regulations.<sup>38</sup> However, many variations exist. A first order of business when preparation of a case begins is a careful check of the applicable regulations for a full assessment of the respondent's rights as these are set down in the regulations. Next the regulations are checked against Executive Order 10450, then both are compared with statutory rights,<sup>39</sup> and all three are analyzed for constitutional shortcomings. Treating the sources of the law of the case in an ascending order has the advantage of testing the lesser authority against the greater back to primary constitutional sources. In the event that the regulations or executive order vouchsafe greater rights to a respondent than more basic law, the defense cannot complain of this happy improbability. However, should lesser rights be extended by any lower source than higher sources require, the discrepancy may provide the basis for an attack upon the legality of the proceedings.<sup>40</sup>

Other matters of more prosaic importance to be checked in the canvass of the regulations are the provisions for answer, the time and form in which the answer is filed, extensions of answer day in the event charges are amended, the right to a hearing, the necessity for and time limits on requests for hearing, the right to demand a bill of particulars, the respondent's rights in connection with the determination of the place of hearing, the right to object to members of a hearing panel and on what grounds, if any,<sup>41</sup> the right to a transcript of the hearing, the right to "request" the attendance of witnesses,<sup>42</sup> procedural rules and

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<sup>38</sup> Citations to sections of the regulations for particular departments or agencies will illustrate propositions in the text. This does not indicate necessarily that the section cited is the only supporting example. Neither does it indicate necessarily that a comparable section occurs in the regulation of every department or agency although identical or nearly identical provisions frequently occur. However, differences are sufficiently common that it is unsafe to indulge any assumption of identity in provisions between regulations for different departments or agencies.

<sup>39</sup> This includes a check of all statutory material which may bear on the substantive or procedural aspects of the case. A useful compilation for initial checking is found in INTERNAL SECURITY MANUAL, note 13, *supra*.

<sup>40</sup> *Cole v. Young*, *supra*, note 22, provides an illustration of the results possible from an alert defense both in testing the legality of Exec. Order No. 10450. *op. cit. supra*, note 1, and protecting the appeal rights of a federal employee under the Veterans Preference Act, 58 STAT. 390, as amended, 5 U.S.C. §863.

<sup>41</sup> In one instance, a respondent was furnished a list of persons appointed to hear his case with the admonition: "should you be acquainted with any of these persons or should you have any basis for objecting to the appointment to the hearing board of any of these persons, please advise . . . immediately."

<sup>42</sup> This right, if it exists, has to be implied. See *Sample Security Regulations*, §9(h), B.N.A., *op. cit. supra*, note 1, 15:108 and those regulations which follow the lead of the sample. See DEPARTMENT OF THE ARMY, *Civilian Personnel*

post hearing processes. Such processes may or may not include a right to see the decision of the board or its memorandum setting out the reasoning leading to a decision<sup>43</sup> and intra-agency review.<sup>44</sup>

For obvious reasons the effort to get a firm grasp on the applicable law precedes the final preparation of the witnesses in the case.

#### PREPARATION OF THE RESPONDENT

Every lawyer has had the experience of reviewing a matter with a client who for one reason or another withholds information vital to his case. Such lack of candor is particularly unfortunate in a loyalty-security case. Therefore, a clear, blunt statement of the importance of a complete revelation of the client's background is indispensable at the beginning of the first interview before any attention is given the charges.

Once counsel and client understand each other on the question of candor, it is imperative to review the charges with the client in tedious detail.<sup>45</sup> Every aspect of his activity of background which has any bearing upon the charge is catalogued and the respondent pressed to recall everything he can. Among the important items in his background are the length of his service with the government, his efficiency rating, his promotions and any details of his personal history, whether favorable or unfavorable, which have any conceivable pertinence to the charges.

Frequently a respondent will have already had one or more interviews with a security officer by the time he seeks legal advice. The interviews may have resulted in a written statement or statements developing the respondent's background as it relates to the charge. Sometimes matters have progressed to the point that the charges have been

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*Security Regulations*, §37 (S.R.-620-220-1 of December 18, 1953 as amended September 30, 1954); B.N.A., *id.*, 15:155. If there is any right, it is a "right" to request the Government to invite a witness. The usefulness of this is circumscribed by the Government's discretion, security considerations, lack of knowledge of the identity of witnesses, and the fact that a request is only that. Nothing could make the insignificance of the invitation to a witness clearer than a comparison between a subpoena and the sample letter inviting witnesses (with various alternatives to attending the hearing) which is reproduced in B.N.A., *id.* 15:161.

<sup>43</sup> Cf. *Navy Civilian Personnel Security Regulations*, 4-14(a)(6)(b)(1), (N.C.P.I. 29, as amended, February 4, 1955) B.N.A., *id.*, 15:217-218 which provides that neither a copy of the decision nor the memorandum of reasons be supplied the employee and Veterans Administration Security Program, 709(K), (*V.A. Regulations* 700-710, as amended, March 2, 1955) B.N.A., *id.*, 15:348 which provides "a statement of the decision of the Board will be furnished the employee by the Director".

<sup>44</sup> See *Navy Civilian Personnel Security Regulations*, 4-16(a) *et. seq.* (N.C.P.I. 29, as amended, February 4, 1955), B.N.A., *id.*, 15:219 *et seq.*

<sup>45</sup> An interview with the Security Officer (see *infra*) may add detail, scope and significance to the charges.



reduced to writing and the respondent's answer, a most important document, has been filed.<sup>46</sup> Obviously, it is vital to procure copies of whatever documents the case has generated. And if the respondent does not have them, he is instructed to get copies from security officer if he can. The number of additional sessions with the respondent depends upon his adaption to preparation, the complexity of the evidence and the number of issues. The frequency, recency and duration of preparation sessions will determine to a large degree the usefulness of the respondent as a witness for himself and, because loyalty-security matters so frequently depend upon recollection of actions or associations forgotten or only dimly remembered, repeated interviews are necessary to help stimulate recall.

A most useful device in recall and in preparing the respondent generally, is the autobiographical sketch. If the respondent's achievements are unimpressive, the ends of preparation are served at least. Should his record be outstanding, the autobiography is introduced as part of the hearing "record".

For a variety of reasons, therefore, it is good procedure to have the respondent prepare a lengthy memorandum setting down every detail of his life. Included in it are the place and date of birth, family background, education, a list of his teachers, some details of his family life,<sup>47</sup> friends, organizations, his insurance policies,<sup>48</sup> magazine subscriptions, reading habits, church attendance, job history, political activity, public speeches, writings and, of course, any other aspects of his life bearing particularly on the charges. An autobiographical sketch espe-

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<sup>46</sup> It will become apparent from a review of any of several departmental regulations taken at random that a considerable investigation precedes suspension, that charges follow suspension, and the employee's answer follows the charges. It is at this juncture that a hearing is possible if the respondent requests it. Cf. Post Office Department Employee Security Program, §§4 and 5 (Order No. 55372 of September 18, 1953 as amended, October 20, 1954), B.N.A., *op. cit. supra*, note 1, 15:293-295.

<sup>47</sup> Experience proves that the details of courtship, especially the lurid ones, do not escape the surveillant eye and may become issues in a loyalty-security hearing. The canons of taste prevent enlivening this point by an example. There is more than a little doubt that such details bear sufficient relevance to security to make them the Government's business.

<sup>48</sup> A fraternal benefit society, licensed in various states until a few years ago, merchandised its policies through social groups organized on a nationality or ethnic basis. Minimum cost and other favorable aspects of the insurance program were used to attract members. Policy holding and membership in the order were synonymous. The Superintendent of Insurance for the state of New York applied for and secured an order to take possession and liquidate the organization which was found to be dominated by the Communist Party, *In re International Workers Order*, 106 N.Y. Supp. 2d 953 (Sup. Ct. N.Y. Co. 1951). Membership in the Order is a frequently assessed charge in loyalty-security proceedings. The implications of security risk are often as unfounded as ignorance of fine print and high corporate policy can make them.

cially designed for the hearing board's perusal, while scrupulously honest, emphasizes the conventional virtues and achievements.

Once every aspect of the respondent's life, the charges against him, the rebuttal of those charges, and the positive factual side of his career which reflects favorably on him are collected and organized, then the general preparation of the respondent for his testimony at the hearing is begun.

In preparing respondent for direct and cross-examination special care should be taken to develop him as a good witness for himself. He is schooled to tell a straightforward story without equivocating. If he is going to testify at all, he must understand the importance in telling the whole truth with complete candor, appreciate the advantages of frankness, and at the same time work on the preparation of his testimony to put it before the board in the words best calculated to secure most favor to himself. By the last nothing more is implied than that the respondent can practice (not memorize) his testimony until the happiest phrases describing what he knows are second nature to him. To illustrate the point, a charge made it appear that the respondent had been involved in a serious morals charge while a faculty member at a well-known university. Investigation showed the truth to be that a landlady with a passion for peace and quiet had objected to a loud but otherwise defensible party attended by some of the younger faculty and older students in an army training unit at the university. The respondent was there. The landlady carried her complaint as far as the university administration. When a somewhat rigid and puritanical attitude was taken by the administrative heads, the respondent objected.

The preparation of the rebuttal to this particular charge was carefully designed to prevent respondent falling into the habit of using the terminology of the charge so as to avoid any reinforcement of the emotional phraseology of the charge itself. The desired effect was achieved by describing the incident accurately in simple, basic English for just what it was—a party in which there was loud talk, some drinking and dancing, perhaps a radio turned up too loudly and a landlady rendered unreceptive to such goings on by the passage of time. In the end the whole incident was placed in a somewhat humorous light, far more consistent with its actual nature than the sinister aspect which the charge gave it.

This practice of conditioning the witness to the "best foot forward" technique is one every trial lawyer attempts to perfect during preparation. It is nothing more than making a conscious choice when either of two responses may be equally true but not necessarily equally helpful.

#### THE INTERVIEW WITH THE SECURITY OFFICER

Where the security officer is available and willing, an interview is sometimes arranged. The face to face conference may elaborate the

specifics of listed charges, indicate which charges the government considers most weighty, whether there are other unlisted charges and whether the listed charges or others not listed are giving the most concern.<sup>49</sup>

This interview also can provide an invaluable opportunity to take some measure of the opposition—the experience, training, zeal, judgment, and fairness of the security officer who may have prepared the charges<sup>50</sup> and who may be responsible for presenting them or the evidence to support them before the hearing board.<sup>51</sup> Experience has suggested a lack of qualifications among security personnel.<sup>52</sup> Formal study confirms an incidence of uneven qualifications which experience, with its obvious limitations, could only suspect.<sup>53</sup> Nevertheless, preparation should always proceed on an assumption of great strength in the opposition. Whatever the strength or weakness of the particular security officer, his central place<sup>54</sup> in the proceedings requires that the defense make the most of any chance to assay his competence.

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<sup>49</sup> In one instance, after repeated assertions that the charges listed constituted the total, the Security Officer inadvertently revealed that he had written a memorandum to the panel prior to the hearing. This, when disclosed, in effect revealed additional “charges” including one founded on the fact that the respondent had once appeared as witness for another respondent. Of course, “charge” is itself a slippery concept. Frequently, the “charge” is no more than a statement with the observation that respondent may wish to comment.

<sup>50</sup> See Post Office Department Employee Security Program, §8(g) (Order No. 55372 of September 18, 1953 as amended October 20, 1954) B.N.A., *op. cit. supra*, note 1, 15:297.

<sup>51</sup> See Treasury Department Personnel Security Program, §6(d) (Treasury Department Order No. 82, Revised August 15, 1955), B.N.A., *id.* 15:308; and *Department of Justice Personnel Security Regulations*, §11 (F) 3, B.N.A., *id.* 15:327: “the Security Officer shall . . . present to the Board such evidence as he thinks commensurate with the interests of the national security . . .”

<sup>52</sup> See *infra*, page --- for an example in point.

<sup>53</sup> “. . . the personal and formal qualifications, the experience and training of persons selected for these positions is . . . of basic importance. The Civil Service Commission has developed qualification standards for Personnel Security Officers in the competitive service which appear to be adequate.

“Approximately one-half of the security officers, however, are in the exempted service and not required to meet these standards although the employing agencies are urged to comply with them. While many agencies have highly qualified personnel in excepted security office positions, it is equally true that some agencies have entrusted much responsibilities to persons with little experience, particularly in the evaluation phases of the loyalty-security field.” REPORT OF THE COMMISSION ON GOVERNMENT SECURITY, page 80 (1957).

<sup>54</sup> A personnel security officer may prepare and present charges for the Hearing Board, Post Office Department Employee Security Program, §8(g) (Order No. 55372 of September 18, 1953 as amended October 20, 1954), B.N.A., *op. cit. supra*, 15:297; and the head of the agency may be represented but the representative is not to act as a prosecutor. Rather he is to aid the Board on procedural matters and advise the employee of his rights if the employee requests it, *ibid.* A “legal officer” performs the same functions under some regula-

## THE SELECTION AND PREPARATION OF WITNESSES

An important part of the defense is the character of the respondent. It is essential, therefore, that a good list of character witnesses be developed. The character testimony should span the whole period of the respondent's life, especially that part involved in the charges. The higher the standing and reputation of such witnesses in the community the better. It is useful also for them to represent as many varied and respectable walks of life as possible. However, it hardly needs to be said that no sincere and knowledgeable witness is discarded simply because he is not prominent.

It will be helpful, of course, if character witnesses can also witness to some factual matters.<sup>55</sup> Frequently it is not possible to get "factual" witnesses because the material contained in a charge is too nebulous to be effectively contradicted. Under such circumstances the best that a witness can do is testify to the basic contradiction between the character of the respondent as the witness knows it and the general charges as laid.<sup>56</sup> For the purpose of this contrast, aspects of the respondent's life other than those directly relating to the charges may be important.

As a matter of course, during the first interview with the client all those witnesses are listed who have or may have any direct knowledge of any specific acts ascribed to the respondent.

An important factor in the selection of fact witnesses from the list is an evaluation (with the respondent) of the attitude of each potential witness toward the respondent, what the witness knows, his appearance, his apparent sincerity or lack of it, his ability to stand-up on cross-examination and any other factors which may enhance or impair his credibility. One vital factor is the courage of the witness. He will be a volunteer without the protection of compulsory process and it is important to know whether he will yield to the pressures he is almost certain to feel on being involved in a loyalty-security hearing. And it is essential that the whole evaluation be re-enforced by interviewing and preparing the witness himself.

Once the evaluation and interview have determined that a witness is to be used, he is subjected to the most rigorous preparation. The

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tions. Treasury Department Personnel Security Program, §6(e) (Treasury Department Order No. 82, Revised August 15, 1955), B.N.A., *id.*, 15:308. In fact, however, particular security and legal officers have asked questions and otherwise behaved in the manner of a prosecutor.

<sup>55</sup> Charges imputing subversion, addiction to alcohol or narcotics, sexual irregularity or simply bad judgment raise questions in which the "character" of the respondent is the principal fact at issue. Frequently, therefore, the distinction between "fact" and "character" witnessing is thin.

<sup>56</sup> Where there are unfavorable aspects of character it is better to admit them at once. If not, there is always the strong probability that the unfavorable evidence is known anyway and the respondent will not have had the benefit of the good impression frankness may give.

importance of telling the truth, telling it in terms which do the respondent most good; of avoiding vagueness and generalities; of demonstrating courteous demeanor, forthrightness and responsiveness; the importance of not being gratuitously offensive and not seeming evasive, are drummed into the witness.

The witness is given a description of the probable procedure at the hearing, told that he must consider the questions asked and his answers carefully, and that he must ask for clarification when he does not understand a question. He is subjected to as many severe cross-examinations during preparation as his need determines. This procedure helps isolate the weaknesses in his knowledge, fix what he knows in his mind, avoid the surprise which may come with hostile, unexpected cross-interrogation, arm him against the trick question and test him for self control. Such pre-hearing preparation may uncover a variety of correctable faults in the witness. It is particularly helpful in detecting and re-training the witness who seems to be reciting from a memorized text. The overly-suggestible, the garrulous, who respond to the simplest preliminary question like an unplugged drain, and the easily angered can be controlled and helped if their weaknesses can be discovered in time.

No preparation can confer sure and total immunity to good cross-examination but it can be so intense that the substance of cross is largely anticipated and a "tough" method anti-climactic for the witness.

#### AFFIDAVITS

Loyalty-security regulations generally provide for the submission of evidence by affidavit. These provisions are broad enough to cover the submission of both fact and character affidavits and practice allows both.<sup>57</sup>

The decision to use an affidavit hinges upon any one of several considerations or combinations of them. The unavailable witness, the saving of time or money, the introduction of evidence that might otherwise be ruled out as merely cumulative, the weak or unimpressive witness with impressive testimony—all provide an occasion for the use of an affidavit.

Obviously if a witness has sufficient prestige, personal forcefulness, and intimate knowledge of the respondent's life and activities to give his testimony particular impact, then every effort is made to have him come in person. When this is not possible then the affidavit is the next best recourse.

#### RULES OF EVIDENCE

The rules of evidence are not binding in loyalty-security proceedings. Relevancy, competency and materiality are mentioned in the

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<sup>57</sup> See *Sample Security Regulations*, §5(f) and §9, B.N.A., *op. cit. supra*, note 1, 15:101, 104, 107-108.

regulations in contexts suggesting rather more concern for expediting the hearing than securing the record against irrelevant, incompetent and immaterial evidence.<sup>58</sup>

The application of the concepts of relevancy, competency and materiality in trial proceedings is hardly an exact science in the hands of experts. When laymen apply these tests to the trial of such elusive and subjective qualities as loyalty and security in the absence of binding rules of evidence, the application is apt to be very loose indeed.

However, an easy application of the evidential standards has compensations. An alert defense can make use of relaxed standards.

With no qualification whatever, newspaper and magazine articles have been received to corroborate testimony, newspaper stories used to evidence the wide-spread forgery of names to nominating petitions and pages from the city directory introduced to show incorrect addresses. Medical reports have been introduced without the physician present for cross examination, birth and baptismal certificates from church sources adduced without any authentication beyond the respondent's identification, and service records have been admitted without authentication from the department issuing them. In one case published copies of polkas written by the respondent were used to prove the nature and therefore the innocence of his association in the music publishing business with a person whose political virtue the Government had cast in doubt. A newspaper article carrying a personal story and a large sample of his whimsical verse was admitted to support his contention that an earlier separation from Government rested on a mistrust of his full attention to duty rather than a refusal to sign a loyalty oath as charged. Refutation both of the refusal to sign the loyalty oath and any reluctance to sign it was backed up by a letter from the supervising employer. But the newspaper "evidence" helped materially in corroborating the respondent's version of the reasons for the previous separation.

When the rules are so relaxed that one party need not substantiate any case, the other must be particularly assiduous to use every allowance he has to make his defense.

#### THE UNCOOPERATIVE RESPONDENT

Occasionally, there may be a respondent who, for reasons of self-preservation or on principle, will not wish to testify at all or at least

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<sup>58</sup> "Both the Department or Agency and the employee may introduce such evidence as the Hearing Board may deem proper in the particular case. Rules of evidence shall not be binding on the Board, but reasonable restrictions shall be imposed as to the relevancy, competency and materiality of matters considered, so that the hearing shall not be *unduly prolonged* . . ." (emphasis supplied). *Sample Security Regulations*, §9(e), B.N.A., *op. cit. supra*, note 1, 15:101. See Department of Agriculture, Personnel Security Program, §2345(e) (8 A.R. 2330-2398 amended, January 24, 1955). B.N.A., *id.* 15:368 for regulations following the language of the *Sample Regulations* on the question of restrictions to be imposed.

will not want to participate fully in the hearing. Regardless of the moral propriety of the position, or the legal justification for it, it is virtually useless to go through the loyalty-security procedures if the respondent feels compelled not to cooperate. In the first place, the requirements of rebuttal of the Government's charges are such that the unanswered question will raise a virtually unscalable impediment to meeting the burden of proof which, in effect, is put upon the respondent. It is inconceivable that the unresponsive respondent can expect any but disastrous inference to be drawn from his failure to undertake his own defense. In addition, Executive Order 10450, Section 6(a)(8) specifically relates invocation of the privilege against self-incrimination before congressional committees to relevant security information.<sup>59</sup> It is unlikely that a hearing board charged with the administration of a standard based on unfavorable inferences from the claiming of the privilege before a congressional committee will look other than unfavorably upon its invocation in the procedures for which the board is immediately responsible.

Accordingly, there is probably only one cogent piece of advice which a lawyer can give a client in a loyalty-security proceeding who insists upon asserting the privilege against self-incrimination. That is—since the chances of success are nil, there is no point in spending time and money in an effort which in the nature of the case is predestined to fail.<sup>60</sup>

#### THE ANSWER

After counsel and respondent have satisfied themselves that they are in command of all the relevant data respecting the charges, then it is time for the drafting of an answer. In this connection the utmost care to achieve factual accuracy is required both because of general

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<sup>59</sup> Security standards in the regulations of a variety of Governmental agencies include this test. See DEPARTMENT OF THE ARMY, *Civilian Personnel Security Regulations*, §III, 17 a. (19) (SR-620-220-1 of December 18, 1953 as amended, September 30, 1954), B.N.A., *op. cit. supra*, 15:140; DEPARTMENT OF COMMERCE, *Personnel Security Regulations*, §5.02, 1. (8) (Administrative Order No. 207-5 (amended July 5, 1955) B.N.A., *id.* 15:392. Similar standards may be applied under *Industrial Security Regulations*, see DEPARTMENT OF DEFENSE, *Industrial Personnel Security Review Regulations*, §III, 13 (22) (Directive issued February 2, 1955, No. 52206.) B.N.A., *id.*, 25:158 where assertion of a privilege before Congressional or Legislative Committees, or Federal or State Courts or other tribunal is deemed relevant security information.

<sup>60</sup> These observations are not to be interpreted as endorsing the position of those who are ready to denounce all who assert the privilege against self-incrimination. Rather they incorporate the only practical advice under the circumstances which prevail in the loyalty-security program. Of course, if a respondent wishes to test, on principle, the right of the Government to discharge a person for assertion of a Constitutional privilege and the issue in the case can be so isolated and sharpened as to forecast the possibility of getting the direct issue before a court, entirely different advice is indicated.

ethical considerations, and because the answer is more a report than a mere pleading. Inadvertent mistakes may bring even the innocent respondent afoul of the perjury laws or those statutes<sup>61</sup> which make it a crime to report false information to federal agencies. This is so even though he is doing his best to give a frank answer to the charges made.

If the answer has been filed at the time counsel is retained, it is reviewed to determine whether an amended or supplemental answer is needed.

#### PREPARATION OF COUNSEL

A section on preparation of counsel would not ordinarily include mention of the lawyer's conduct toward the court. It is axiomatic that courteous and deferent conduct toward the court or tribunal conducting a hearing is properly to be expected from counsel. But whether expected or not, it is simple good sense not to gratuitously alienate the tribunal which controls the fate of the client. This does not mean that Uriah Heep is the lawyer's preceptor. Nor does it mean that he should not take a firm position with the tribunal when the protection of his client's interest demands it. However, the client's advantage usually responds to his lawyer's calculated self-control. And so much occurs routinely in loyalty-security proceedings that outrages even a modest sense of justice, that counsel is well advised to anticipate the unusual charge and unusual proceeding and be prepared to temper his reactions sufficiently to register sincere indignation without exploding in ineffective disrespect.

Such a large portion of loyalty-security cases involve political, economic, or social views and political or economic affiliations that very frequently an important phase of preparation lies in the direction of developing a general acquaintance with political movements and their literature. Except in the simplest matters, counsel starting from complete innocence can not hope to acquire the mastery he needs within a few days, or even weeks. Consider the fairly elemental political problem posed counsel for a Catholic respondent charged with membership in both the Communist Party, U.S.A. (Stalinist) and the Socialist Workers Party (Trotskyist). That Catholicism and membership in the Communist Party are inconsistent is obvious even to the neophyte. What is not so obvious is the vastly improbable mixture of the two political elements or *any* combination of two of the three political-religious ingredients present in the charge.

As suggested, the example raises no large problems although requiring some acquaintance with one of the large conflicts within and one of the major opposition forces outside the left-wing movement.

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<sup>61</sup> See 62 STAT. 749, 753; 18 U.S.C.A. §§1001, 1621 (1948).



As political, economic and social questions become more complex, the large reserves of information available in any metropolitan or collegiate library are consulted. A principal part of the problem is the ability to recognize and define the issues pertinent to the preparation so as to narrow the search and keep it within viable bounds. However, both the recognition and definition may require a political sophistication not easily acquired. And sometimes charges will involve the formulations or the activities of small, "splinter" groups not quickly researched even when the researcher knows what he is looking for. In such situations, the advocate who can find an expert to tutor him is lucky. So is his client.

A lawyer well prepared for a political case also ought to have some acquaintance with history, especially current history. But no one can be sure just where in time this acquaintance ought to begin. In one hearing it became apparent that the security officer who had prepared the charges was not as well acquainted with the philosophical roots and revolutionary implications of the Declaration of Independence as perhaps the public has a right to expect. To assess the spaces in the security officer's knowledge of matters bearing on the events of 1776, the defense information had to reach back at least as far as John Locke who died in 1704.<sup>62</sup>

The importance of an awareness of current historical fact is forcefully demonstrated by the case of the security officer who made a great deal of the fact that a respondent had a female acquaintance who kept a recruiting poster for the Spanish Loyalist Army on a bulletin board in her apartment during the year 1941. The sinister implications of this circumstance seemed to lie in the probability that a recruiting program was in progress for a foreign army reputed to be Left Wing. However, when it was pointed out that the Spanish War had been over since 1939, not only was the security officer thrown into some confusion which seemed to impede the remainder of his examination of the respondent, but the poster was transformed. It became a collector's item rather than the symbol of a radical interest.

If a lawyer comes anew to such problems he is probably well advised not to attempt an unguided effort through the literature. There are some short cuts. Before supplementing what he may already know with work in the library, he should go to the nearest college or university with a political science, economics, sociology, or history department and arrange to discuss some of the problems of his case with one or more social science experts who may be able to fill in his information so that he can better evaluate the dimensions of the charges against his

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<sup>62</sup> The respondent was charged with having "demonstrated an unfavorable attitude toward existing Government institutions". As it developed, someone (not necessarily the respondent) had challenged a patriotic creed as contrary to the Declaration of Independence. The degree to which the Declaration is itself a challenge to existing institutions was a matter to which the Security Officer was not sensitive.

client.<sup>63</sup> In this fashion he may be able to acquaint himself with the particular political and/or social problems in his case with a minimum of effort, and even acquire sufficient expertness in a narrow area to be able to perform with considerable political acuity when the occasion arises on trial.

Of course, good preparation requires a thorough acquaintance with the facts of the case itself. This implies repeated reviews of testimony between counsel, the respondent and the witnesses until both counsel and those who are to testify have an assurance respecting that which each can expect from the other.

It is probably impossible for a lawyer to know too much about the facts, the witnesses or the client. The simplest bit of background information may, on occasion, prove exceedingly useful. In one instance, a respondent was known to have studied political science in college. When, on cross examination he admitted having read certain radical literature, an effective redirect examination, founded on the virtual certainty of his wide reading as a political science student, was managed by inquiring whether he had read *The Wealth of Nations*. The response was affirmative. When further questions elicited that he had read *Science and Health* and *The Bible*, (Old and New Testament), it was possible to fill out a picture of the respondent as a general reader, and argue with some force in the final summation that if it were logical to characterize him as a radical for the left-wing literature that he had read, then he certainly ought to be cast as a free enterpriser and in various religious postures for his acquaintance with Adam Smith, Mary Baker Eddy and both the Old and New Testaments.

There is no amount of acquaintance with the whole spectrum of political, historical, social and religious issues and literature which one can say with certainty is useless in loyalty-security proceedings. Therefore, it is only half facetious to suggest that preparation of defense counsel in extra-legal areas for loyalty-security representation should begin about thirty years before his retention by the client.

#### THE HEARING BOARD

Typically, security hearing boards are composed of three members, including the chairman.<sup>64</sup> The sample security regulations recommended by the Department of Justice provide for "not less than three civilian officers or employees of the Federal Government, selected by (head of department or agency) from rosters maintained for that purpose by the Civil Service Commission in Washington, D. C. and at regional offices

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<sup>63</sup> College and university experts are by no means the only sources. Sometimes a local radical may be the most knowledgeable expert available on the ramifications of some esoteric aspect of left wing politics.

<sup>64</sup> See *Navy Civilian Personnel Security Regulations*, 4-12b (N.C.P.I. 29, as amended, February 4, 1955) B.N.A., *op. cit. supra*, note 1, 15:211.

of the Commission". The sample further provides that no member of the board be employed by the same department or agency as the respondent, or be acquainted with him.<sup>65</sup> In addition, nominees to security hearing board rosters are subjected to "full field investigation, and . . . nomination . . . determined to be clearly consistent with the interests of the national security".<sup>66</sup>

The decision of a board has only the force of a recommendation to the department or agency head who makes the ultimate decision to terminate.<sup>67</sup>

When the members of a hearing board are known in advance each is checked in the biographical services and any other available source for any detail that may bear on his social or political attitudes. Place of birth, schools, church affiliation, fraternal orders, publications, occupation and civic interests are all matters to be used in gauging the pitch and emphasis of the respondent's evidence.

If one member of the panel has been active in church work and the respondent has worked actively in church affairs, it may be wise to point up the respondent's efforts in this direction. For obvious reasons it may appear inconsistent to a panel member active in church activity for any man who has devoted time to it, to be at the same moment subversive. Of course, this tactic involves some risk. For it may be that the panel member will be particularly disposed to suspect any one who combines church work with any unconventional political activity. Identifying the respondent's interests with those of the board members will probably be most effective where the political case against the respondent is relatively weak. In any event, this approach cannot be applied mechanically. Its usefulness will vary from case to case.

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<sup>65</sup> *Sample Security Regulations*, §8(a) (b) and (c), B.N.A., *id.* 15:106. Such qualifications for board membership may provide a limited basis for a challenge to members of a Hearing Board. See footnote 41 *supra*. Cf. DEPARTMENT OF THE ARMY, *Civilian Personnel Security Regulations*, §IV 19, (SR-620-220-1 of December 18, 1953 as amended September 30, 1954) B.N.A., *id.* 15:141 where it is said, "by agreement with the Department of Justice, cases of employees of the Departments of Defense, Army, Navy, and Air Force will be heard by personnel of those departments".

<sup>66</sup> *Sample Security Regulations*, §8(e), B.N.A., *op. cit. supra*, note 1, 15:106. The responsiveness of a panel of Government employees to security processes is a potential source of difficulty for trial counsel. *Voir dire*, if allowed, certainly would include the question whether the employee felt he could vote for clearance without jeopardizing his own job. Government employees who have acted as witnesses for other charged employees have later found the witnessing laid against them in charges. Why should a board member feel immune if he votes for clearance?

<sup>67</sup> See *Sample Security Regulations*, §5(h) (3) and (4), B.N.A., *id.*, 15:105; See also DEPARTMENT OF THE ARMY, *Civilian Personnel Security Regulations*, §IV 19, (SR-620-220-1 of December 18, 1953 as amended September 30, 1954) B.N.A., *id.*, 15:141.

## THE HEARING

Hearings are generally informal but orderly, and, on the basis of experience with loyalty-security boards, it can be said that the respondent is usually accorded a courteous hearing. Only in rare instances have individual board members exhibited any particular animosity toward a respondent. However, good manners cannot fill gaps in the procedures afforded the respondent. Therefore a thorough defense anticipates a series of challenges at the outset of the hearing before opening statements. Mainly this process of challenge is aimed at preserving objections in the event a review in the courts is later determined to be necessary or desirable.

Considerations of cost usually limit whatever review is made. Nevertheless, it is never certain that an appeal to the courts will not be taken. Therefore, the record is protected in anticipation of the possibility. To do this properly it is necessary to raise every conceivable constitutional issue available to the respondent. Due to the lack of procedural certainty and definition of method, it is probable that whatever technique is adopted will be sufficient so long as it clearly attempts to save the issue. Thus a motion to dismiss the charges is a feasible way to raise constitutional objections.

Since the Government usually presents no case beyond reading the charges and will readily concede that it does not intend to do more, the basis for one branch of a motion to dismiss is laid by asking the question which will elicit the concession.

Further preliminary inquiry is addressed to the hearing board to fix the detail of bases for additional branches of the motion to dismiss. It is asked whether the Government intends to present any witnesses, and if so, whether they will be available for cross-examination. Virtually always, the first question is answered in the negative, and so, necessarily, is the second. Another important preliminary is a request for subpoenas to insure the attendance of any unwilling witness or to protect the respondent's friendly witnesses in the event any question arises after the hearing with respect to their having volunteered for a man charged with being a security risk.<sup>68</sup> This will be denied. In addition, if there are particulars which are needed in order to properly prepare a defense, a specific request should be made.<sup>69</sup> Denial will provide an additional basis for constitutional attack where the charges without amplification remain too vague to apprise the respondent with sufficient definiteness of

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<sup>68</sup> U. S. CONST., Amend. IV and VI.

<sup>69</sup> It is probably advisable to request that particulars at the time the answer to the charges is prepared and to renew it at the opening and close of the hearing if the required specification has not been achieved.

<sup>70</sup> See also *Deak v. Pace*, 185 F. 2d 997 (1950) (insufficient information to supply reasons for removal as required under statute); *Money v. Anderson*, 208 F. 2d 34 (1953) (Classified Civil Service—lack of specificity in charge made

the charges he is to meet.<sup>70</sup> Where charges are based on the respondent's associations, guilt by association can be argued in support of the motion as still another failure of due process.<sup>71</sup>

Invariably the motions to dismiss on constitutional grounds are denied. The denial is based on a general lack of authority to rule. But there are regulations in some agencies which specifically deny the authority of the Board to pass upon "legal or constitutional objections to the procedure under the security program".<sup>72</sup>

Further preliminaries are disposed of before actually getting into the evidence. These vary, depending on the case. A standard, however, is the indication to the board and for the record that the objectives of the respondent are clearance, back pay, and re-instatement if this happens to be the case. The first part of the remedy sought is obvious without specific reference, but the omission of either of the latter two conceivably could result in an order omitting any reference to back pay or re-instatement. Assuming that more than clearance is desired, this is made clear and the scope of the requested remedy is specified.<sup>73</sup>

Next in order, but certainly close to first in importance, is an effort to commit the government on the question whether the charges specified constitute the whole charge against the respondent. The secrecy which shrouds the Government's case compounds the difficulties in making sure that the full charge has been revealed even where the question has been asked and assurances given. For even after the scope of the issues has been so fenced,<sup>74</sup> other unspecified charges may remain. In one instance, after the Government had repeatedly assured the respondent that he had received the full charges against him, the security officer remarked near the close of the hearing that he stood on his pre-hearing memo-

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it impossible for the respondent to prepare and present his defenses adequately); *Mulligan v. Andrews*, 211 F. 2d 28 (1954) (Classified Civil Service—discharge must be based on charges preferred in advance); and *Kutcher v. Higley*, 235 F. 2d 505, 509 (1956) (Classified Civil Service and preference eligible—discharge under Exec. Order No. 9835 and Exec. Order No. 10241—reasons for discharge could not have been fairly anticipated from charges as laid. Discharge improper under the rule of the *Mulligan* case, *ibid.*)

<sup>71</sup> See *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Schneiderman v. United States*, 320 U.S. 118, 136 (1943); *Bridges v. Wixon*, 326 U.S. 135, 142-143 (1945).

<sup>72</sup> Treasury Department Personnel Security Program, §7(4) (Treasury Department Order No. 82, Revised August 15, 1955), B.N.A., *op. cit. supra*, note 1, 15:309.

<sup>73</sup> There is a real possibility that reinstatement followed by reporting for duty are pre-requisites to back pay even if return to duty is only formal and followed by resignation after the first day. There may be a difference where the reinstatement is due to "procedural" error rather than a finding that it was "unjustified or unwarranted". See the letter of May 6, 1957 from the Comptroller General of the United States to the Secretary of the Air Force, B.N.A., *id.* 19:540 which discusses these problems. An abundance of caution probably counsels a report for duty and at least one day of work after reinstatement in order to safeguard back pay claims.

random. After some colloquy over the availability of this document for the respondent's inspection, the chairman of the board (who happened to be a lawyer) ruled it had to be produced.<sup>75</sup> In it the Government had added some specifics with respect to the respondent—the fact that he witnessed for others in security proceedings, that he had discussed his own case with great candor, but that the Government was not sure whether this stemmed from an honest endeavor to help or fear over his own status. The net effect of the memorandum was to add some dimension to the charges.

In the light of this experience it is a good precautionary procedure to request the Government and its board to make available any memoranda or other writings discussing the respondent's case which have not been made available to him. The writings may not be forthcoming on demand but it will be embarrassing to the other side to use them later.

In the event that new charges are developed during the hearing, the defense choice is to ask for a recess or for a continuance, depending upon the time needed for preparation to meet the new matter.<sup>76</sup> Clearly if it is of such complexity or importance that it cannot be readily dealt with in a short recess, then a continuance for further preparation must be demanded. If denied, the denial becomes the basis for another objection to the fairness of the process.

If there is a lawyer member of the hearing board, it is generally a good idea to aim the material in the case which reflects a failure of adequate procedure at him. It is frequently the case that the panel looks to him for advice and, other things being equal, his training may orient him favorably toward as much due process as the inherent limitations of the loyalty-security program will allow.

The board may ask counsel to dispense with an opening statement feeling that it is unnecessary to their understanding of the case. If given an option, however, he probably ought to resolve it in favor of a short preliminary recital of what he intends to prove. In addition to assisting the panel to understand the case, the opening can accomplish two other objectives. In the first place, rapport with the board may be promoted by a candid statement of willingness to put everything relevant to the respondent's life on the record. For obvious reasons, this is not always the sensible thing to do and this phase of the opening remarks is limited

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<sup>74</sup> The importance of "fencing" to post hearing proceedings is fairly obvious. However it may be optimistic to hope that the reviewing body will take a dim view of unfavorable findings based upon unrevealed charges especially after assurances of full revelation. For the shocking aspects of "convictions" based on unknown informants, unspecified and unrevealed charges (and therefore essentially on undisclosed evidence) are part and parcel of security processes as presently constituted.

<sup>75</sup> Query, what recourse if the Security Officer had still refused?

<sup>76</sup> See Department of Justice, Personnel Security Regulations, §11 B.6., B.N.A., *op. cit. supra*, note 1, 15:327.

or enlarged as the facts of a particular case demand. Secondly, while the board member's minds are still fresh, there is a particularly good opportunity to put over a prospectus of the defense which will most favorably condition them toward respondent's proofs and argument.

There remains the problem of getting the respondent's case into evidence. This is not a matter of unusual difficulty in the technical sense because of the relatively loose evidential rules in loyalty-security hearings. However, there is the matter of the order of evidence. No hard and fast pattern can be set for this but as a general rule the evidence should build up the proof from the least to the most dramatic points. Sometimes this requires concluding with the respondent himself. However, the strongest presentation may require beginning with him. Where he is placed in the stream of evidence will depend upon his own peculiar strengths and weaknesses. If he makes a very good impression for himself there is some reason for beginning with him so that the most favorable impression can be made upon the panel at the earliest possible moment. An equally persuasive argument can be made for concluding with a respondent who leaves an excellent impression. If for reasons of personality he gives the impression of being shifty or evasive, lacking in credibility or in some other way is unattractive, bury him between witnesses of greater strength who will create a better impression first and last.

Whether a closing argument is made depends on circumstances. After a long hearing the sensible course may be the waiver of oral argument particularly when a post-hearing brief is to be filed. Presumably, the brief will cover the same ground in a more thorough and, almost certainly, better organized way. Moreover, if the hearing concludes at the end of the day, the receptiveness of tired board members to the most brilliant of arguments is apt to be unenthusiastic. Of course, the board may request argument. When this is so, the best possible forensic effort is called for. Accordingly, preparation is organized on the assumption that a closing argument may be necessary.

#### POST HEARING

Whether or not the regulations provide for a post-hearing brief, the practice encountered before a number of agency and departmental boards is to allow them. The opportunity for a brief is never passed. For the purpose of briefing, the transcript is available. Apart from the argument, the brief affords a rare chance for the respondent's case to be supported by record references. These are gleaned from the amorphous mass of relatively unimportant or irrelevant materials which inevitably clutter a hearing record. This shortens the board member's route to that part of the record which helps the respondent most. But even if the transcript is a document clear of irrelevant material, the respondent is well served when the facts which tell for him are organ-

ized in the most effective progression and supported by accurate references to the transcript. Apart from the professional obligation discharged by such industry, a board of busy or lazy men reviewing the record may be more easily persuaded by that evidence it can readily locate in the record.

In spite of the fact that a hearing board will not pass upon legal aspects of the program and is confined<sup>77</sup> to a decision, reflected in a recommendation that the respondent has or has not made a case for clearance, it may be useful for psychological effect and also to further save what is loosely called "the record" in security proceedings, to repeat the constitutional arguments in the brief and to spell out there the total relief demanded. In an appropriate case re-instatement and back pay are added to the request for clearance.

An unfavorable finding and recommendation is reviewed by the agency head before a decision to terminate is made final. The review is based on a study of all the documents in the case including the "record" of the hearing.<sup>78</sup> The brief becomes a document in the case and, whether its influence on the hearing board is much or little, provides the best opportunity for the respondent's arguments to be marshalled and his evidence reviewed in the light he considers most favorable to himself. No other device except the oral argument on the record will get his interpretation of the case before the reviewing tribunal.<sup>79</sup>

#### CONCLUSION

Success in loyalty-security litigation is certainly not uniform or easy. All the normal problems of trial are enlarged and compounded by the lapses in the program from even the minimum standards for a fair trial.

But difficulty provides the very best excuse for thorough preparation. Where this is combined with vigorous effort on trial, even the abnormal impediments of the loyalty-security processes may be overcome.

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<sup>77</sup> *Sample Security Regulations*, §5, (h)(4), B.N.A., *op. cit. supra*, note 1, 15:105. See note 72, *supra*, and the text it supports.

<sup>78</sup> Public Law 733, *supra*. See also *Sample Security Regulations*, §5(h)4, B.N.A., *ibid*.

<sup>79</sup> This assumes that the briefs will be read. Failure to brief leaves the respondent's interpretations on review to such summation as the Board may make in its written decision or memorandum of reasons. There is no assurance that any summation of the respondent's position will be included but the best intentioned effort may filter out the emphasis the respondent considers essential to his case.